YAP YOKE SAM v. PUBLIC PROSECUTOR

[A. Cr. J. (Buhagiar J.) April 13, 1955]

[K. L. — Criminal Appeal No. 19 of 1955]

Road Traffic — Motor Vehicles Commercial Use Regulations, 1945, reg. 7 — Where driver is employee — Not his duty to obtain haulage permit — Motor Vehicles Third Party Risks Regulations, 1946, reg. 3(1) and (2) — Insurance policy — Not employee's responsibility — Criminal Procedure Code (Cap. 6) s. 173A(ii)(a).

In this case the appellant was an employee of the appellant in Khoo Teck Yam v. Public Prosecutor.[1] He was the driver of the van belonging to his employer and was charged with offences under the Motor Vehicles Driving Licences Regulations and with other offences similar to those with which his employer was charged. At the time relevant to the charges the appellant was driving the van in question with his employer at his side.

This appeal was against conviction and sentence on offences under the Motor Vehicles Commercial Use Regulations and the Motor Vehicles Third Party Risks Regulations.

Counsel for the appellant conceded that technically the appellant had committed the offences in question but submitted that he should not have been charged with these offences as he was only an employee and as such he was not responsible for obtaining a haulage permit or for seeing that a third party risk insurance policy was in force for the use of the vehicle for commercial purposes.

Held: (1) it was not the appellant's duty to obtain a haulage permit or to see that a proper third party risks insurance policy was in force; (2) in the circumstances of the case the Magistrate could have exercised the powers conferred on him by s. 173A (ii) (a) of the Criminal Procedure Code.

[Editorial Note:— s. 173A (ii) (a) of the Criminal Procedure Code (Cap. 6) reads: "When any person is charged before the Court with an offence punishable by such Court, and the Court finds that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the Court may, without proceeding to record a conviction, make an order . . . . . — (a) dismissing the charge or complaint after such admonition or caution to the offender as to the Court seems fit; . . . . ." There is no equivalent section in the Singapore Criminal Procedure Code, 1955, but see however the Probation of Offenders Ordinance, 1951, s. 8.]

Cases referred to:—

(1) *Khoo Teck Yam v. Public Prosecutor* (1955) M.L.J. 112.

(2) *Carpenter v. Campbell & Ors.* (1953) 1 All E.R. 280.

MAGISTRATE'S CRIMINAL APPEAL.

Ng Ek Teong for the appellant.

J. P. Kirby (Federal Counsel) for the respondent.

Buhagiar J.: — This appeal is connected with Criminal Appeal No. 20 of 1955[1]. The appellant was the driver of the van belonging to the appellant in the other appeal. The appellant was charged with offences under the Motor Vehicles Driving Licences Regulations and with other offences (third and fourth charges) similar to those with which the appellant in the other appeal was charged.

The appellant is an employee of the appellant in the other appeal and was at the time relevant for the charges driving the van with the employer at his side.

The appeal is against conviction and sentence on the last two charges.

The learned Counsel for the appellant conceded that technically the appellant has committed the offences in question but submitted that he should not have been charged with these offences; he submitted that the appellant is only an employee and as such he is not responsible for obtaining a haulage permit or for seeing that a third party risk insurance policy is in force for the use of the vehicle for commercial purposes; furthermore as the person whose duty it was to see to such things was charged, the charges against the appellant amounted to a multiplicity of charges. The learned Counsel referred me to the case of *Carpenter v. Campbell & Ors.*[2] where Lord Goddard held that although it is technically correct for a summons to be issued against the driver of the unlicensed vehicle, this course tends to be oppressive and is undesirable where the driver is the employee of the owner and not responsible for the licensing of the vehicle. In that case the case was sent back to the justices to convict the company (the owner of the unlicensed vehicle) and the justices were directed to give an absolute discharge to the driver. Lord Goddard added: "and I hope that persons who are responsible for these prosecutions will not in similar cases multiply summonses in this way, but will serve the people responsible and not the people who are not responsible."

The learned Deputy Public Prosecutor tried to distinguish the present case from the English case; he said that in the English case the driver was not guilty of any other offence while in the present case, the driver was not in possession of a driving licence and was not accompanied in the vehicle by a person who held a driving licence. I do not follow this argument. Whatever offences the appellant was guilty of, it was not his duty to obtain a haulage permit or to see that a proper third party risks insurance policy was in force.

In the circumstances of this case I agree with the *dicta* of Lord Goddard in *Carpenter v. Campbell & Ors.*[2] and in my opinion this is a case where the learned Magistrate could have exercised the powers

conferred on him by section 173A(ii)(a) of the Criminal Procedure Code. In my opinion it is just that an order dismissing the third and fourth charges be made and I make an order accordingly under the said provisions of section 173A (ii) (a) of the Criminal Procedure Code. The order of conviction on such charges is therefore set aside and the fines on such charges, if paid, are to be refunded to the appellant.

Order accordingly.

Solicitors for the appellant: *Braddell & Ramani.*

MOH YEE CHONG (f) & ANOR. v. PUBLIC PROSECUTOR

[A. Cr. J. (Thomson J.) April 14, 1955]

[Ipoh — Criminal Appeal No. 20 of 1955]

Criminal law and Procedure — Criminal Procedure Code (Cap. 6), s. 422 — Defective charge although irregular not fatal to subsequent proceedings — Emergency Regulations — Emergency (Rubber Control) Regulations, 1949, reg. 4(1) — Unlawful possession — Onus on prosecution — When onus passes to accused to show possession not unlawful.

The appellants were convicted and sentenced to 3 months imprisonment for unlawful possession of rubber. The charge against each of them read as follows: "That you on 1.1.55 at about 10.20 a.m. at Jalong Tinggi Estate, Sungei Siput North in the State of Perak did have in your possession to wit 95 katties of scrap rubber valued at $28.50, which was fraudulently obtained and that you thereby committed an offence under reg. 4(1) ER (Rubber Control) 1951 and punishable under reg. 5(2) as amended by LN. 536/53."

The evidence against the appellants were that in broad daylight they were riding on their bicycles along the road leading from the estate on which they were then employed as rubber tappers and each of them was carrying on the back of her bicycle a sack containing scrap rubber. They were seen by two police officers who for some purpose or another were hiding in the neighbourhood of the road and they were stopped.

Under the Regulation the charge must be with being in "unlawful possession" of rubber. Counsel for the appellant contended that the charge of "fraudulently" obtaining the rubber was defective and that the convictions were against the weight of evidence.

Held: (1) by reason of s. 422 of the Criminal Procedure Code (Cap. 6) the defect in the charge, although an irregularity, could not possibly be said to have occasioned a failure of justice and therefore it was an irregularity which was not fatal to the subsequent proceedings; (2) for the purposes of the Regulation, unlawful possession of rubber was an offence, and, in the absence of anything further, in any prosecution the onus would lie on the prosecution. But, if the rubber in question is such as might be reasonably suspected of being stolen or fraudulently obtained, then, and on that being established, a *prima facie* case of unlawful possession was made out and the onus then passed to the accused person if he was to avoid conviction of proving that his possession of such rubber was not unlawful. Since the prosecution in this case failed to make out their case or as to pass the burden of proof on to the accused the appeal must succeed.

MAGISTRATE'S CRIMINAL APPEAL.

S. P. Seenivasagam for the appellants.

I. Talog Davies (Federal Counsel) for the respondent.

Thomson J. (delivering oral judgment): — The two appellants in this case were convicted of unlawful possession of rubber in contravention of Regulation 4(1) of the Emergency (Rubber Control) Regulations, 1949, in the Magistrate's Court at Sungei Siput and each sentenced to three months imprisonment. Against these convictions and sentences they have now appealed.

The Regulation reads as follows:—

"Whoever has in his possession, or conveys in any manner, any rubber which may be reasonably suspected of being stolen or fraudulently obtained may be charged with being in unlawful possession thereof, and, unless he satisfies the Court that he was lawfully in possession of such rubber he shall be guilty of an offence . . . . . ."

To my mind, the construction of that Regulation is by no means easy. I think, however, it is to be construed in this way. For the purposes of the Regulation, unlawful possession of rubber is an offence, and, in the absence of anything further, in any prosecution the onus would lie on the prosecution of proving it up to the hilt. But, if the rubber in question is such as may be reasonably suspected of being stolen or fraudulently obtained, then, and on that being established, a *prima facie* case of unlawful possession is made out and the onus then passes to the accused person if he is to avoid conviction of proving that his possession of such rubber was not unlawful.

In the present case, I have to consider both the charges and the evidence which was produced in support of them because on both of these the convictions have been attacked.

I will deal in the first place with the charge which reads as follows in the case of the first appellant:—

"That you on 1.1.55 at about 10.30 a.m. at Jalong Tinggi Estate, Sungei Siput North in the State of Perak did have in your possession to wit 95 katties of scrap rubber valued at $28.50, which was fraudulently obtained and that you thereby committed an offence under Reg. 4(1) ER (Rubber Control) 1951 and punishable under Reg. 5(2) as amended by LN. 536/53."

In this charge '1951' is clearly an error. It should be '1949'. But the point is of no importance. The charge against the second appellant was in similar terms.

I have no hesitation in saying that these charges were defective. It would have been sufficient had they merely averred that the accused was in unlawful possession of rubber. Or they might have set out the matter in more detail and stated that the accused was in possession of rubber which was reasonably suspected of being stolen or fraudulently obtained and was thereby in unlawful possession of it. I think, however,